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In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

ADDITIONAL BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

GARRET W. MCENERNEY,
Counsel for Respondent.

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(1) There are four questions involved in the Government's application for certiorari. Three of them deal with the construction of the forty-nine words which constitute the prohibition contained in Section 6 of the Raker Act approved December 19, 1913 (38 Stat. 242), the text whereof appears in the frontispiece to this brief. The remaining question is whether or not, in any event, the case is an appropriate one for certiorari.... 1

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(2) The decision of the Circuit Court of Appeals rests upon three propositions, two of which relate to the construction of Section 6, and the third to the interpretation of the agreement of July 1, 1925 between the Municipality and the Company. The Court held that the agreement was one of agency and not one of sale for resale and the Government does not ask certiorari to review this ruling. Hence its application is based wholly upon statutory construction, i. e., the construction of Section 6; and is met at the threshhold by the two propositions of statutory construction upon which rests the decision of the Circuit Court of Appeals, i. e., that Section 6(a) prohibits sale for resale, without more; and (b) does not prohibit a contract of agency..... 14

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(3) Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice; nevertheless, we here bring these to the attention of the court to make known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that we may show how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof; and also as a basis for invoking the rule that the petitioner should not here be heard upon a proposition never before advanced in the case (Helvering v. Minnesota Tea Co., 296 U. S. 378, 380; Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498) and contrary to that urged by it with directness and reiteration below (see supra, pp. 4-5). We reserve until later, consideration of the section textually 16

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(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was in the House. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a prohibition of sale for resale (and nothing more) 18

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(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type 31

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(d) In its opinion, the District Court followed the argument of the Department of Justice that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that Act because it was a contract of sale for resale and not a contract of agency. The Government's argument that agency is prohibited was noted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9), but was given no other consideration... 37

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(5) It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency nor to forbid the same (see Opinion of Circuit Court of Appeals, supra pp. 11 ft., 12 ft.). The argument for a latitudinarian construction of Section 6 contended for in the petition for certiorari is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that the Government has never contended to the contrary of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C.C.A. p. 8, quoted supra p. 7); concessions seemingly renewed by implication in petition for certiorari, p. 7, footnote 5, last line.... 45

(6) In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which

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"transcends the judicial function" (298 U. S. 237). The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition 56

(7) The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are some provisions of the statute to support them.... 60

(8) There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, nor that the congressional policy which underlies Section 6 is any broader than that expressed therein 61

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(9) There is no sound argument in the petition for certiorari to overthrow the proposition (a) that it is the purpose of Section 6 to and it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency. With this being shown, nothing remains for us to do except to answer question third, supra, page 2, by showing that there is no remaining argument in the petition respecting the interpretation of Section 6 which, if sound, would call for a reversal of the decree of the Circuit Court of Appeals. Indeed, we expect to show there is no remaining argument at all 65

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THE GENESIS OF SECTION 6 OF THE RAKER ACT.*

June 25, 1906: President Theodore Roosevelt's Dictation for Inclusion in The Owens River Grant to Los Angeles (R. 657, 659-660).

". . . that . . . the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the City for irrigation purposes."

June 30, 1906: The Owens River Grant to Los Angeles (34 Stat. 801, 803).

"Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

April 7, 1913: Earliest Form of Section 6 of the Raker Act, H. R. 112, 63rd Congress, 1st Session.

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county."

December 19, 1913: The Raker Act (38 Stat. 242).

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

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*We refer throughout to the first clause of Section 6. As the Government noted in one of its briefs below: "The second clause of Section 6, stated in the form of a proviso, plainly **does not relate to the same subject matter as**, or restrain, modify, or otherwise affect, **the first clause**. The word 'Provided' has no significance here, simply serving to separate or distinguish the two clauses" (Govt. Supp. Br. CCA, p. 18, line 30 to p. 19, line 3).

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ADDITIONAL BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

(1) There are four questions involved in the Government's application for certiorari. Three of them deal with the construction of the forty-nine words which constitute the prohibition contained in Section 6 of the Raker Act approved December 19, 1913 (38 Stat. 242), the text whereof appears in the frontispiece to this brief. The remaining question is whether or not, in any event, the case is an appropriate one for certiorari.

The following four questions are the only ones (so we submit) involved in the disposition of the Government's Petition for Certiorari.

First: Is it the purpose of Section 6 to, and does it prohibit sale for resale?

Second: Does Section 6 prohibit a contract of agency?

Third: If (a) Section 6 does prohibit sale for resale and (b) does not prohibit agency, is there any remaining argument of the Government respecting the interpretation of Section 6 which if sound calls for a reversal of the decree of the Circuit Court of Appeals?

Fourth: Is the present action one of a type wherein this Court grants certiorari (Rule 38) considering that we are here dealing with what might be called a private bill involving matters of local concern and not of national moment, i. e., a statutory grant by a proprietor, as contradistinguished from a sovereign, made upon adequate and more than adequate consideration paid by the Municipality to the Government in money and money's worth including the annual statutory payment to the Government, which within the period December 19, 1913-December 19, 1938, totalled $350,000., and since the latter date is $30,000. annually in perpetuity (Raker Act, Sec. 7, R. 21:17-27), all for land and easements, etc. in lands,[1] as

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[1] At the final hearing in the District Court, Joseph James Phillips, Director of Property for the Municipality (R. 311) and R. P. Hansen, one of its civil engineers (R. 305) gave testimony (R. 558-564) that the value of the lands obtained by the Municipality from the Government was $244,139.75 (R. 559) and that the moneys paid to the Government and for work performed by the Municipality by the requirement of the Government, including $350,000. for annual rental, totalled $2,702,607. (R. 564). This testimony was later stricken out (R. 557-564). We submit it should be taken into account in determining whether it is appropriate in any event to grant certiorari in the case.

The Government may have proceeded upon the idea that it should be paid for the benefits which would accrue to the Municipality rather than compensation for the lands granted. This is contrary to the universal rule in kindred situations. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195 (1910): "It [the Constitution] merely requires that an owner of property

Congress did not grant any water or water rights and as the Municipality acquired the waters and water rights involved through appropriations under the laws of California and not from the United States? (Raker Act s. 11, R. 36); and considering in addition that recovery by the Government herein would confer no benefit whatever upon it but inflict great damage and injury upon the Municipality?

The First Question.

Is it the purpose of Section 6 to and does it prohibit sale for resale?

The proposition stated in the Petition, page 8 foot, that **"the 'selling' prohibited is not the selling of energy for resale" was never before advanced in this case;** and is contrary (a) to the plain language of section 6, (b) to the views expressed with unanimity in Congress during the passage of the act; (c) to the unbroken interpretation of the section by the Department of the Interior within the period 1913-1937; (d) to the position taken by the Department of Justice in the District Court (1) in the

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taken should be paid for what is taken from him. . . . And the question is what has the owner lost, not what has the taker gained"; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 76 (1913); "The value should be fixed . . . with reference to the loss the owner sustains . . . and not as enhanced by the purpose for which it was taken"; 20 *Corpus Juris* 776, "Eminent Domain", § 232: "Compensation must be reckoned from the standpoint of what the landowner loses by having his property taken, not by the benefit which the property may be to the other party to the proceedings."

Grants by the United States to a political subdivision of one of the states of the Union are to be dealt with on the basis that they are such, and it would have to be assumed, even if the case were one of a gratuitous grant, that the general government acted as *parens patriae*.

complaint filed therein; (2) in the opening statement at the final hearing: (3) in its position stated anew by counsel through the final hearing (October 19, 20, 21, 1937) in arguments respecting the admission and rejection of proposed evidence; and (4) in its two printed briefs there submitted November 1, 1937 and February 26, 1938; and (c) to the position taken by the Department of Justice in its two briefs filed in the Circuit Court of Appeals, March 14 and July 10, 1939, notably the later i. e. "Supplemental Brief for Appellee United States" (referred to herein as "Govt. Supp. Br. C.C.A.")[2] where speaking to the point here under consideration, it said:

Govt. Supp. Br. C.C.A., July 10, 1939.

"The right to sell, granting of which is prohibited by section 6, is . . . the right to sell the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 3-7).

"Congress was restricting the City in dealing in a proprietary capacity with water and energy obtained by the use of the property of the United States" (p. 4, lines 8-11).

"Sale for resale is prohibited" (p. 6, line 5).

"[Any suggestion which] implies that sale for r under certain circumstances is not prohibited, is [untenable]" (p. 6, lines 6-8).

"Congress sought out the strongest terms it could find to prohibit a transfer by the City grantee to any

[2]Certified copies of the four Briefs filed by the Government as above mentioned, two in the District Court and two in the Circuit Court of Appeals are filed with this brief. Nine additional copies of each of them are also filed except of the first brief, that submitted in the District Court November 1, 1937, of which no additional copies are filed because they are not available.

private corporation or individual of an unrestricted ownership of the energy or water" (p. 6, line 27 to p. 7, line 2).

"Any sale or transfer by the City to such a corporation or individual must be of such nature that it does not carry with it the right to sell" (p. 7, lines 2 to 4).

"The statute clearly prohibits a sale which permits a resale, in other words, a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed" (p. 7, lines 10-15).

"The prohibition of the statute is against the granting to an individual or private corporation of the right to sell" (p. 8, lines 19 to 21) "the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 6 and 7).

"Section 6 of the Raker Act prohibits sale for resale" (p. 9, lines 4-5).

"**The breach occurs not in the sale, but in transferring with it the right to sell**" (p. 9, lines 11-13).

The Second Question.

The second question is whether Section 6 prohibits a contract of agency. The Government so contends.

This contention is contrary to (a) the plain language of section 6; (b) the views expressed with unanimity in Congress during the passage of the act; (c) the unbroken interpretation of the section by the Department of the Interior within the period 1913-1937; and (d) the position taken by the Department of Justice in the District Court (1) in the complaint filed therein; (2) in the opening statement at the final hearing; (3) in its position stated

anew by counsel through the final hearing (October 19, 20, 21, 1937) in arguments respecting the admission and rejection of proposed evidence and (4) in the opening "Brief for Plaintiff" United States filed in the District Court November 1, 1937.

The brief of the Government lastly mentioned was followed by Brief for Defendant submitted December 20, 1937, wherein it was said (p. 22, lines 12-15):

> "The Government concedes (so we understand) that an agency contract does not violate the Raker Act but contends that the contract under review is not an agency contract."

Then followed the Reply Brief for Plaintiff submitted to the District Court, February 26, 1938, wherein, for the first time the Government made the contention that Section 6 forbade a contract of agency, and wherein as will be noted, the Government explicitly stated that this was a new contention. (Indeed it was one never before put forward.)

Reply Brief for Plaintiff United States in District Court.

The brief said (pp. 17-18):

> "Section 6 of the Raker Act is violated by the selling or letting to the company of the right to sell power generated at Hetch Hetchy, whether or not accompanied by transfer to the company of title to the power itself. This argument may be regarded as a new contention on the part of the United States, par-

ticularly in view of the statement of the issue in the opening statement for the plaintiff. (Tr., p. 12.)[3] It is, therefore, recognized and conceded that the defendant may file reply thereto as it may be advised."

In order that we may have before us the limitations which the Government in a later brief put upon its argument that Section 6 forbids a contract of agency, we quote from the above mentioned "Supplemental Brief for Appellee, United States", filed in the Circuit Court of Appeals (p. 8), as follows:

Govt. Supp. Br. C.C.A., July 10, 1939.

"Contrary to the statement in the [Municipality's] Outline of Oral Argument (p. 17), the Government has never argued 'that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent' and there is nothing in the decree which requires that the City make distribution without an agent.

The prohibition of the statute is against the granting to an individual or private corporation of the right to sell. Solicitor Edwards recognized that it did not prohibit employment of an agent for transmission purposes (R. 353-355) and the Government has never contended to the contrary.' The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City."

[3]The opening statement for the plaintiff, referred to above as appearing in Tr. p. 12, appears in the Record, pp. 189-192, particularly in R. 189:28-190:14, and R. 191:27-192:10. The pertinent quotations therefrom appear infra p. 32

The First and Second Questions Jointly.

As the first question is whether it is the purpose of Section 6 to, and whether it does prohibit sale for resale and the second question whether it prohibits a contract of agency, it is important in each instance that the text of Section 6 should be in mind.

Section 6 of the Raker Act reads as follows:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

If we strip the section of unnecessary words and omit the words "letting" and "sublet" as not presently germane we will find the meaning of the section standing out strikingly. Thus dealt with, it reads as follows:

> "Sec. 6. That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual . . . the right to sell . . . the water or the electric energy sold . . . to it or him by the said grantee [San Francisco]."

It is to be noted that Congress was here making provision in respect of a sale (of either water or electricity) by the grantee (here the City and County of San Francisco) to a corporation or an individual and prohibiting "a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed" (Govt. Supp. Br. C.C.A. p. 7, lines 10-15, quoted supra p. 5).

Section 6, as appears by the frontispiece, was copied from Section 6 of The Owens River Grant to Los Angeles, approved June 30, 1906 (34 Stat. 801) which had been incorporated in the Los Angeles grant at the request of President Theodore Roosevelt and in words dictated by him in a letter to the Secretary of the Interior dated June 25, 1906 (R. 657, 659-660), five days before the measure was passed and approved by him.

The prohibition in the Dictation of President Theodore Roosevelt for inclusion in The Owens River Grant, as well as that in Section 6 of that grant, and finally, as in Section 6 of the Raker Act, involves an ellipsis[4] (so we submit),

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[4]An ellipsis is defined as follows: "Omission of word or words, usually such as will be inevitably supplied by the mind, or understood, in the construction of a sentence" (Wyld's Universal English Dictionary, 1936); "Omission of word or words easily understood but necessary to the grammatical construction" (Macmillan's Modern Dictionary, 1938); "The omission of a word or words necessary to the complete construction of a sentence but not required for the understanding of it" (Standard Dictionary, 1908); "Omission from a construction of one or more words, which are obviously understood, but which must be supplied to make the expression grammatically complete, etc." (Webster's International Dictionary, 1919). "The omission of one or more words in a sentence, which would be needed to complete the grammatical construction or fully to express the sense" (The Oxford Dictionary (1897)).

In re Lippincott's Estate, 276 Pa. 283, 120 Atl. 136 (1923), says (p. 137, c. 2 foot):

> "An elliptical form of expression is quite common in writing and speaking alike, and perhaps in wills and contracts most of all. It is not necessary to repeat things that have just been expressed; they are understood to be in the mind of the speaker or writer, and the listener or reader likewise understands them, without repetition. In Goold Brown's Grammar of English Grammars it is said, at page 815:
>
> "'Ellipsis is the omission of some word or words, which are necessary to complete the construction, but not necessary to convey the meaning. Such words are said, in technical phrase, to be understood; because they are received as belonging to the sentence, though they are not

and as "there is no canon against making explicit what is implied" (*United States v. Sischo*, 262 U.S. 165, 169, opinion by Mr. Justice Holmes (1923)); we supply the omission in three different versions as follows:

The Ellipsis: Two Versions:

"Sec. 6. That [in selling or letting water or electric energy] [or] [in sales or leases of water or electric energy] the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The Ellipsis: Third Version.

"Sec. 6. That the grantee is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

(We submit that the words supplied by us as upon an ellipsis do no more than express the interpretation of Section 6 put upon it by the Government in the language above quoted from Govt. Supp. Br. C.C.A., supra pp. 4-5.)

In some instances, an ellipsis consists in the omission later of what had been expressed before; but the same rule is applicable of course where the omission of words

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uttered. Of compound sentences, a vast number are more or less elliptical; and sometimes, for brevity's sake, even the most essential parts of a simple sentence are suppressed. There may be an omission of * * * even a whole clause, when this respects what precedes.' "

is at the beginning but clearly indicated by what follows, as in this case.

(We submit that the language of Section 6, without addition, clearly manifests the purpose which we ascribe to the section, and with the supplied words that meaning is made doubly certain.)

In connection with the first and second questions jointly which we have here under consideration, it will be helpful if we quote how they were dealt with in the opinion of the Circuit Court of Appeals:

Opinion of Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals says (R. 674, 106 F.2d 575, c. 1, lines 12-32):

> "We conclude that there was no sale made by the City to the Company of the electric energy distributed to the customers in San Francisco and that the contract was one by which the City employed the Company to transmit the City's power to the consumers thereof in the City.
>
> The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal.
>
> We conclude that the City did not violate Section 6 of the Raker Act by making a sale of electric energy to the Company."

Opinion of Circuit Court of Appeals (Continued).

Again (R. 676-677; 106 F.2d 575, c. 2, line 26 to p. 576, c. 1, line 10):

"The City, in its brief submitted after the argument, contends that Section 6 of the Raker Act prohibits a sale of electric energy for resale.[5] It states: 'The government and the municipality are agreed that Section 6 prohibits sale for resale.'

The United States, in its brief submitted after argument, states: 'The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City.'

It concedes, however, that the Act 'did not prohibit employment of an agent for transmission purposes.'

In view of the position of the City that the Act prohibits a sale for resale, we base our decision upon the sole ground that the contract between the City and the Company was an agency agreement and not a contract of sale.

As to the contention of the United States, reasserted and amplified in its brief after argument, that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City for disposition of the energy on its behalf, it is sufficient to point out that what we have already said disposes of this question. We point out further, however, **that there are no words contained in Section 6, supra, that are appropriate to prohibit such**

[5]This statement should not be read as saying that the City had so contended for the first time. In fact, from the very beginning the position of the Government that Section 6 forbids sale for resale was concurred in by the City.

an arrangement. The United States relies much on the fact that Section 6 prohibits not only 'selling' the 'right to sell' but also prohibits 'letting' that right. But the term 'letting' in Section 6 obviously means leasing. This is clear by the use of the word 'to' between the word 'letting' and the words 'any corporation' in the section."

The Third and Fourth Questions.

It is impossible profitably here to do more than mention the third and fourth questions until it is made clear beyond peradventure how the first and second questions should be answered, namely, that Section 6 forbids sale for resale and does not forbid agency. Accordingly, we shall consider these latter propositions after a short summary of the propositions involved in the decision of the Circuit Court of Appeals with a reference to those of them sought to be reviewed here and later give consideration to the third and fourth questions.

(Note in the preceding paragraph that the argument that Section 6 prohibits sale for resale in the Government's last brief below (supra pp. 4, 5) merely "reasserted and amplified" what had been contended for by it before. Note, also, that the Government claimed below that the prohibition of sale for resale and a prohibition of agency co-existed and arose out of the same language.)

(2) The decision of the Circuit Court of Appeals rests upon three propositions, two of which relate to the construction of Section 6, and the third to the interpretation of the agreement of July 1, 1925 between the Municipality and the Company. The Court held that the agreement was one of agency and not one of sale for resale and the Government does not ask certiorari to review this ruling. Hence its application is based wholly upon statutory construction, i. e., the construction of Section 6; and is met at the threshhold by the two propositions of statutory construction upon which rests the decision of the Circuit Court of Appeals, i.e., that Section 6 (a) prohibits sale for resale, without more; and (b) does not prohibit a contract of agency.

The decision of the Circuit Court of Appeals (R. 661-677, 106 F.2d 569) as we have seen by its Opinion supra pp. 11-13, rests upon three propositions. (The parties were in agreement below as to the first but not as to the second or third.) The three propositions are (1) that Section 6 of the Raker Act forbids the Municipality to sell electric energy to a corporation (excepting certain public corporations) or individual for resale; (2) that the prohibition does not extend to a contract of agency; and (3) that the agreement of July 1, 1925 between the Municipality and the Company is one of agency and not one of sale for resale.

The Government does not seek certiorari to review its specification of error that the Circuit Court of Appeals erred "in failing to hold that the contract of July 1, 1925 between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act" (Petition, p. 8, lines 3-6). This specification "is not urged as a reason for granting the writ of cer-

tiorari, but is reserved for argument on the merits" (Petition, p. 8, footnote 6); and it is said that "if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City" (Petition, p. 2, footnote 1).

In these circumstances, we feel that we are neither called upon nor entitled to enter upon a discussion to show that the contract is one of agency and not one of sale for resale; but in that connection, we wish to note that the Government, with seeming studied purpose, has set forth in its Petition statements in respect of the contract which constituted the grounds upon which it asked the courts below to hold that the contract was one of sale and not one of agency. In our opinion, these statements are not pertinent to the questions sought to be presented in the Petition, but if they should be thought to be so, we wish to draw the attention of the Court to the fact that they are not pertinent to the question whether the contract is one of agency or one of sale for resale because that question is not here for consideration and to suggest that the Petition should be treated as though it contained an explicit acceptance by the Government of the decision of the Circuit Court of Appeals upon the interpretation of the contract.

Leaving on one side the interpretation of the contract as not presently pertinent and treating the agreement for present purposes as one of agency and not one of sale for

resale, we are concerned only with the propositions involving the construction of the pertinent part of Section 6 of the Raker Act approved December 19, 1913 (herein spoken of as Section 6, without more), 38 Stat. 242 (R. 12-36, 192-216).

We propose now to consider the interpretation of Section 6, treating it, first, historically, and next, textually.

(3) Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice; nevertheless, we here bring these to the attention of the court to make known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that we may show how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof; and also as a basis for invoking the rule that the petitioner should not here be heard upon a proposition never before advanced in the case (Helvering v. Minnesota Tea Co., 296 U. S. 378, 380; Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498) and contrary to that urged by it with directness and reiteration below (see supra, pp. 4-5). We reserve until later consideration of the section textually.

From the beginning the Government has steadfastly argued that Section 6 was a clear and unequivocal prohibition against sale for resale.

In its first brief filed in the District Court November 1, 1937, it is said (p. 58):

> **Brief for Plaintiff (U. S.) November 1, 1937 (D. C.)**
>
> "It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale

of such energy to a private party for the purpose of resale. **In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified.**"

We agree with the position of the Government thus stated in the first brief it filed in the District Court; and we quote, infra, pp. 56-59, from decisions of this and other courts to the effect that "as this court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive" (*Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937)).

The same is true of the interpretation put upon Section 6 in the Department of the Interior. There is nothing ambiguous in the prohibitions but if there were, the interpretation of the Department through the years would be followed. *United States v. Minnesota*, 270 U.S. 181, 205 foot (1926): "Even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction"; *Wisconsin v. Illinois*, 278 U.S. 367, 413 foot (1929): "Nothing is more convincing in interpretation of a doubtful or ambiguous statute"; *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921): "If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except

for cogent reasons"; *Brewster v. Gage*, 280 U.S. 327, 336 foot (1930): "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons"; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 foot (1931): "They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons."

With these views in mind, we proceed to consider the interpretation which has consistently been put upon Section 6 by the different departments of the Government and to show that for twenty-four years (1913-1937) including the period during which the Raker Act was in course of enactment in Congress, there was unanimity in the interpretation of Section 6 as forbidding, in cases presenting the contentions here present, sale for resale and nothing more.

(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was in the House. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a prohibition of sale for resale (and nothing more).

Discussion of Section 6 in the House.

The purpose of Section 6 was dealt with in the House on August 29, 30 and September 2, 1913, by Representative Towner of Iowa, Representative Thomson of

Illinois, a member, and Representative Ferris of Oklahoma, Chairman of the House Committee on the Public Lands. They said:

"It is proposed in this bill that the city can not sell water or power to any corporation or individual to sell or sublet. But it is not provided that the city may not sell to any corporation it chooses all the water or electric energy it desires for its own use." (Representative Towner, August 29, 1913, 50 Cong. Rec. Appendix, p. 462, c. 2.)

"Under the provisions of section 6 the grantee . . . can not sell water or electric energy to any private corporation or individual for the purpose of resale." (Representative Thomson, August 30, 1913, 50 Cong. Rec. 3980, c. 1, top.)

"Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individual or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? . . . If this language is read carefully I think it will be seen that . . . these municipalities are prohibited from ever selling or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it." (Representative Thomson, August 30, 1913, 50 Cong. Rec. 3996, c. 2, top.)

"It says that the city can sell their water power to private individuals or corporations for consumption, but not for the purpose of resale." (Representative Thomson, September 2, 1913, 50 Cong. Rec. p. 4094, c. 2, middle.)

"When this bill was being considered by the committee I offered an amendment to Section 6, . . . by

adding the words 'or electric energy'. With those words in that section . . . San Francisco may sell this water or electric energy . . . to any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2, ft.–4097, c. 1, top.)

"San Francisco could not sell to any soap manufacturer or ice manufacturer anything that they could resell, but they could sell it to them for their own use." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 1, foot.)

"There is an express provision to the effect that they can not resell the power in any way. They can sell for use only with a positive restriction against sale for any resale purposes of any sort." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 2, middle.)

It is manifest that these members of the House who spoke respecting the meaning of Section 6 read the section as it is written and had no difficulty in understanding that the provision was intended to prohibit sale for resale (and nothing more).

We now consider how the section was dealt with in the Department of the Interior.

(b) Whenever it had occasion to consider Section 6 in the period 1913-1937 the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale (and nothing more).

The record shows that Section 6 came under review or was mentioned or referred to in the Department of the Interior on five different occasions and that there were three formal opinions by Solicitors of the Department and one by the Secretary dealing with the subject.

The first was by Solicitor Edwards, June 8, 1923 (R. 342-354); the second by Acting Solicitor Wright, July 20, 1925 (R. 234, last line; 359-366); the third by Solicitor Margold October 27, 1933 (54 I. D. 316; R. 243, line 14); and the fourth by Secretary Ickes August 24, 1935 (R. 232-269).

In each of these, the opinion was expressed in one form or another that Section 6 forbids sale for resale, without more.

Solicitor Edwards' opinion did not deal with the contract of July 1, 1925 for it was rendered in 1923 two years before the contract was made.

Acting Solicitor Wright, whose opinion was written nineteen days after the execution of the contract of July 1, 1925, held "that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute" (R. 234:31-235:8).

Solicitor Margold dealt with the meaning of Section 6 abstractly, and not specifically in reference to the contract. He held (in 1933) that "San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the mu-

nicipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed" (54 I. D. 316, 317).

Secretary Ickes held that Section 6 forbids a contract of sale for resale and that the contract of July 1, 1925 was such a contract of sale for resale and not one of agency and therefore was in violation of the Raker Act.

Considering that the Government is **not** asking certiorari to review the ruling of the Circuit Court of Appeals that the contract is one of agency and not one of sale for resale, it would seem to be at least a trifle unfair when it says, Petition, page 7, "Secretary Ickes concluded that the contract was in violation of the Raker Act", without more, whereas it should have said "Secretary Ickes concluded that the contract was [one of sale for resale and] in violation of the Raker Act [because Section 6 of that act forbids a contract of sale for resale]".

There is nothing to show when Acting Solicitor Wright's opinion was made public or came to the knowledge of the Municipality. So far as the Record shows it first became publicly known through reference thereto in Secretary Ickes' opinion of August 24, 1935 (U. S. Ex. 11, R. 230-269), where it is said (R. 234:31-235:8):

> "On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute."

Secretary Ickes' opinion was introduced in evidence by the Government. The Municipality offered the opinion of Acting Solicitor Wright. The Government objected. The

opinion (for text thereof, see R. 359-366) was received in evidence subject to a motion to strike it out, and later, on motion of the Government, was stricken out. This was Assignment of Error No. 11 by the Municipality (R. 535).

Opinion of Solicitor Edwards: Circumstances Giving Rise Thereto.

The work of construction of the Hetch Hetchy project covered the period 1913-1925, and in that period it became necessary for the Municipality to provide electric energy necessary in construction work. By 1918 the Municipality had constructed and was operating in the High Sierras the Early Intake Power House, which is a relatively small one, presently furnishing only 3% of the entire electric energy generated by the Municipality.[6] The amount generated at Early Intake in 1918 exceeded construction requirements and there was a surplus either to waste or to be disposed of. This was during the World War. The Federal Power Administrator for California September 18, 1918 directed the Municipality to make arrangements to turn this power over to the Sierra and San Francisco Power Company so that it would be available for general use (R. 408-410), which was accordingly done. The Pacific Gas and Electric Company had no interest in the Sierra and San Francisco Company at that time, but later became lessee of its system, and later still, acquired its physical properties.

[6]The contract of July 1, 1925 deals only with energy generated at the Moccasin Power Plant, but the District Court finds that "since late in 1935, the electric energy . . . [generated] at the City's Early Intake plant . . . has been and is now being delivered to the Company under the terms of the contract" of July 1, 1925 (R. 161).

This disposition of the Early Intake surplus power continued to 1923 by which time the sale of energy through a period of five years had totalled $200,000 (R. 345 foot). In that year the National Park Service called the situation to the attention of the Secretary of the Interior and this fact gave rise to Solicitor Edwards' opinion, which is mentioned in the opinion of Secretary Ickes, from which we quote, infra, pages 26-27.

Opinion of Solicitor Wright: Circumstances Giving Rise Thereto.

The Ordinance of San Francisco authorizing the contract of July 1, 1925 was "passed for printing" (for that term, see R. 219) June 22, 1925, and was finally passed and approved by the Mayor June 29, 1925 (R. 90).

Section 2 of that Ordinance provided (R. 89): "As soon as said agreement is duly executed by the parties therein named, a duly executed copy or certified copy thereof shall forthwith be presented to the Secretary of the Interior of the United States at Washington, D. C.".

Within the week June 22-29, 1925, Assistant City Attorney Dailey and City Engineer Eckart of San Francisco were in Washington conferring with Mr. Edwards, Assistant Secretary of the Interior (in the absence of Secretary Work) about the contract, and Mr. Dailey remained on the same errand to July 4, 1925 (R. 335:4-337:3).

The District Court refused to receive the testimony of Mr. Dailey respecting the substance of his conversation with Mr. Edwards (R. 337:4; Ruling and Exception No. 9: R. 533; Assignment of Error No. 9), but it is clear that Mr. Edwards received from Mr. Dailey a copy of the contract because Mr. Dailey was pressing for an approval

of the contract by Secretary Work as one of agency and not one of sale for resale. A copy of the contract was delivered presumably by Acting Secretary Edwards to Acting Solicitor Wright for an opinion on its validity, and the latter rendered to the Secretary the above mentioned opinion of July 20, 1925, which, so far as the record shows, never became public nor known to the Municipality until 1935.

Secretary Work having returned to Washington in late July or early August, 1925, the Mayor and Chairman of the Finance Committee of the Board of Supervisors of the Municipality went to Washington to procure the approval of the contract by Secretary Work as one of agency and not one of sale for resale, with the result that on August 19, 1925, Secretary Work wrote the Mayor of San Francisco, then in Washington, telling him that the Act did not require his approval of the contract, and he would "await a reasonable time until performance shall have indicated whether or not the acts of the parties constitute such a violation of the law as will make action on his part proper" (R. 357).

No ruling upon the question, which after all was the question whether the contract was agency or sale, was ever made by Secretary Work.

In 1930 Secretary Wilbur had discussions with representatives of the Municipality, principally due to delinquency in performance of conditions required by the Raker Act in respect of the construction of roads, trails, etc. and the contract of July 1, 1925 was incidentally mentioned, but it was spoken of by the Secretary

on the theory that it was one of sale for resale and hence in violation of the Raker Act because, so it was assumed on all hands, the act forbade sale for resale.

Solicitor Margold's Opinion: Circumstances Giving Rise Thereto.

It is evident that an inquiry was addressed to the Secretary of the Interior in 1933 which called for an interpretation of the Raker Act and that Mr. Margold's Opinion of October 27, 1933 (54 I. D. 316) was given in consequence of the inquiry but without any direct reference to the contract of July 1, 1925. In Secretary Ickes' Opinion in 1935 (R. 243) reference is made thereto, but it is erroneously cited, without title, as appearing in 51 I. D. 316, whereas the citation should have been 54 I. D. 316.

Secretary Ickes' Opinion: Circumstances Giving Rise Thereto and Extracts Therefrom.

Secretary Ickes fixed a hearing respecting the validity of the contract of July 1, 1925 for May 6, 1935 (R. 227-229) and after that hearing rendered his opinion offered in evidence by the Government at the final hearing (R. 232).

This opinion of Secretary Ickes, August 24, 1935, brings out clearly his own ruling that Section 6 of the Raker Act prohibits sale for resale, and that he put the invalidity of the contract of July 1, 1925 on the ground that it involved sale for resale. In the course of his opinion, dealing with the interpretation of Section 6, he said:

Extracts from Secretary Ickes' Opinion.

"In an opinion dated June 8, 1923, the Solicitor [of the Department of the Interior, Mr. Edwards] determined that any sale of Hetch Hetchy power for the

purpose of resale was prohibited by the Raker Act. . . . He suggested that an arrangement be made 'by which the grantee [the City and County of San Francisco] would have its power transmitted over the lines of the concern [Pacific Gas and Electric Company] owning or controlling the existing distribution system'." (R. 234:11-23).

"Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. . . ." (R. 234:24-28).

"On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute." (R. 234:31-235:8).

"A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate.[7] In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Immediately after pointing out that the contract might be viewed (1) as Proper, (2) as improper, or (3) as

[7] Of course if the Attorney General felt that he would be called upon at that time to say that in his opinion the contract was one of agency and not one of sale, the opinion would be a source of embarrassment in the future. On the other hand, if he was of the opinion that the contract was one of sale and not one of agency, there would not be any embarrassment in the future because his position in the litigation would be in harmony with his opinion.

proper because temporary, he stated, 'In the exercise of your discretion you may come to the conclusion that this last is the correct view'.[8]

After receiving that advice, Secretary Work on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time." (R. 235-236).

"The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act." (R. 242:14-18)

". . . . San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers." (R. 243:9-13)

"An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated," etc. (R. 243:24-27)

"San Francisco was granted certain rights on federally owned lands, subject to various conditions, among them those contained in section 6, prohibiting sale for the purpose of resale of any electric power developed on the land." (R. 245:13-17)

"I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the

[8]We understand the meaning of this last sentence to be that the Secretary of the Interior could decide that the contract was proper because temporary, without holding any view as to whether it was proper (generally) or improper.

purpose of resale and that this prohibition is legally valid." (R. 247:1-4)

More Extracts from Secretary Ickes' Opinion.

Thereupon Secretary Ickes proceeded to deal with the contract, and we quote his language in respect thereto as re-assertions of his conviction that Section 6 forbids sale for resale (and nothing more). The Secretary said:

"In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute." (R. 248:20-22)

"It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers." (R. 256:9-11)

"It is my opinion that the provisions of section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale." (R. 267:31-268:4)

The foregoing extracts from Secretary Ickes' Opinion make it very clear that his position was (a) that Section 6 of the Raker Act is aimed at sales with the right of resale; and (b) that the contract of July 1, 1925 would have been valid had he found it to be a contract of agency, but inasmuch as he found it to be a contract of sale for purpose of resale, he held it to be in violation of the Raker Act.

Secretary Ickes' Correspondence With Board of Supervisors (S. F.) and the Attorney General 1937.

Later, Secretary Ickes had correspondence with the Board of Supervisors of San Francisco, followed by a

letter wherein the Secretary requested the Attorney General to bring this action, of which we quote only so much as bears upon the point which we now have in hand.

> Secretary to Board, March 11, 1937: ". . . I have already advised you of my determination that San Francisco is now and for many years past has been violating the provisions of section 6 of the Raker Act by selling Hetch Hetchy energy to the Pacific Gas and Electric Company for distribution to consumers [resale]. . . ." (R. 271:6-11)
>
> Board to Secretary, March 30, 1937: ". . . This Board believes that the agency contract under which City is now acting is fully in accord with the Raker Act". (R. 273:14-17)
>
> Secretary Ickes to the Attorney General, April 2, 1937: ". . . San Francisco was granted the right to construct the Hetch Hetchy Project. . . . Numerous conditions are placed on the grant, among them being one which prohibits the sale of power generated by the grantee on the project for the purpose of resale by the purchaser" etc. (R. 275:15-23)

This action was commenced April 27, 1937, twenty-five days from the last quoted letter of Secretary Ickes to the Attorney General.

We submit that the foregoing shows beyond peradventure that whenever it had occasion to consider Section 6 in the period 1913-1937, the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale, and nothing more.

We now proceed to show that in its complaint and in all proceedings in this action in the courts below, the Depart-

ment of Justice has maintained the position that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that act merely because it was a contract of sale for resale and not a contract of agency; that the District Court, accepting the theory of the Government, so held, and that the Department of Justice did not abandon its said position when, for the first time four months after the final hearing, and on February 26, 1938 it first argued that Section 6 also forbids an agency of a particular type.

(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type.

To sustain the proposition just stated, we start with the Complaint filed April 27, 1937.

Complaint.

Paragraphs VIII, IX and XVIII of the Complaint read as follows (R. 6, 9, 39):

> "VIII. That defendant is now and since on or about June 29, 1925 has been enjoying using and occupying the said rights, easements and lands of plaintiff in evasion of and contrary to the aforesaid terms and conditions of said Act, more particularly section 6 thereof, in this that the defendant has since said date been and now is selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private cor-

poration for and with the purpose and intent that the said corporation resell the same to its customer consumers, including[9] the people of said defendant;"

"IX. That from time to time since June 29, 1925, the Secretary of the Interior has represented to defendant that its sale of said electric power to said Pacific Gas & Electric Company was in evasion of and contrary to the terms and conditions of said Act and has requested that defendant cease and desist from said practice;"

"XVIII. That under color of said Act the defendant will continue as aforesaid to wrongfully enjoy, use and occupy said rights, easements and lands, and to sell to said corporation for resale the electric power thereby and thereon generated, and will thereby continue to defraud and damage plaintiff, unless and until restrained by your Honorable Court, and that the continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained;"

Government's Opening Statement at Final Hearing.

In the opening statement at the final hearing which occupied October 19, 20 and 21, 1937 (R. 189-192) the United States Attorney said:

"The issue is a simple one. The question is has the City and County of San Francisco violated the provisions of Section 6 of the Raker Act. If the evidence shows a violation by the City and County of San Francisco of the provisions of Section 6 of the Raker Act, the Government asks this Court to make a finding that this contract entered into on July 1,

[9]The word "including" was added by amendment filed June 25, 1937 (R. 39, ls. 1-3).

1925 between the City and County of San Francisco and Pacific Gas & Electric Company is a contract of sale, and is violative of the provisions of Section 6 of the Raker Act, and enjoining the City and County of San Francisco from continuing to sell power for purposes of resale pursuant to the terms of that contract to the Pacific Gas & Electric Company, or to anybody else." (R. 189:28-190:14).

"Briefly, that is the issue in this case: Is this contract entered into by the City and County of San Francisco on July 1, 1925, a contract of agency, a contract merely by which the City and County of San Francisco consigns to the Pacific Gas & Electric Company as its agent certain power for distribution, or is it a sale of power by the City and County of San Francisco to the Pacific Gas & Electric Company for a definite sum to be paid monthly and thereafter sold by the Pacific Gas & Electric Company to its consumers . . ." (R. 191:27-192:8).

". . . this contract is not a contract of consignment, and is not a contract of agency, but is a contract for the sale of the electric energy . . . to the Pacific Gas & Electric Company for the purpose of resale, and that the sale of this energy [the Government contends] to the Pacific Gas & Electric Company for the purpose of resale is violative of the provisions of Section 6 of the Raker Act." (R. 191:4-14).

Government's Position Through the Final Hearing.

This position was maintained by the Government throughout the final hearing, as illustrated by the following:

"The question before this Court, as I understand it, is whether this is an agency contract or whether it is not an agency . . ." (R. 341:6-9).

"If it is an agency contract and the P. G. & E. as the agent is serving the City and County of San Francisco instead of buying it might be that the Raker Act is not being violated." (R. 341:13-17).

Following the conclusion of the final hearing October 21, 1937, the Department of Justice filed its opening "Brief for Plaintiff" November 1, 1937. The Municipality filed its "Brief for Defendant" December 20, 1937, and the Department of Justice filed its "Reply Brief for Plaintiff" February 26, 1938.

Brief for Plaintiff (U. S.) November 1, 1937 (D. C.).

In the brief of November 1, 1937 it is repeatedly asserted that Section 6 of the Raker Act prohibits sale for resale, as follows:

"Section 6 of the Raker Act is a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale." (53:16-19)

"Section 6 of the Raker Act constitutes a prohibition or covenant against the sale of electric energy, generated by the defendant on the Hetch Hetchy project, to any private person or corporation for the purpose of resale." (53:20-24)

"The real question is whether the sale or disposition of that energy by the defendant under conditions necessarily contemplating its resale to consumers is in derogation of Section 6 of the Raker Act." (54:20-55:2)

". . . Section 6 prohibits the sale of electric energy to a private person or corporation, such as the Pacific Gas and Electric Company, for the purpose of resale." (56:10-12)

"It is submitted that the language of Section 6 is a clear and unequivocal prohibition against sale to a private person or corporation of the right to resell the electric energy generated on the Hetch Hetchy Project; a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale." (58:15-21)

"[Congress] prescribed in Section 6 that those lands could not be used for the generation or transmission of energy to be sold to a private party for resale." (60:4-7)

The portions of the brief which deal with the contract and wherein it is argued that it is one of sale for resale are here quoted as additional evidence that the Government therein maintained that Section 6 forbids sale for resale. The brief says:

Brief for Plaintiff (U. S.) November 1, 1937 (D. C.).

"In the disposition of electric energy under the contract of July 1, 1925, with the Pacific Gas and Electric Company, the defendant is selling Hetch Hetchy energy to the company for the purpose of resale as prohibited by Section 6 of the Raker Act." (67:22-27)

". . . the language of consignment is used throughout the contract of July 1, 1925, between the defendant and the Pacific Gas and Electric Company. If the contract truly be one of consignment or agency, then the power distributed to consumers by the company as a result of that contract is distributed for and on behalf of the defendant and the full transaction is one of sale directly by the defendant, acting through its agent, to the consumer." (67:28-68:7)

"... there can be no doubt that the contract is one of sale for resale rather than one of consignment or agency." (72:3-5)

"... the transaction is in fact one of sale to the company for the purpose of resale." (72:29-31)

"... there can also be no doubt that the transaction is one of sale to the company for resale." (75:8-10)

"... the transaction between the parties is actually one of sale for the purpose of resale." (78:24-25)

"It is respectfully urged that the foregoing authorities and arguments are conclusive in establishing:

...

2. That the Raker Act contains a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale; and

3. That the defendant is selling energy generated on the Hetch Hetchy project to a private corporation, the Pacific Gas and Electric Company, for the purpose of resale in direct violation of the statute." (83:9-25)

The foregoing extracts show that until the filing of the reply brief for plaintiff, February 26, 1938, the Government, without interruption, maintained that what San Francisco was forbidden to do by Section 6 of the Raker Act (and all that it was forbidden by that act to do in the pertinent circumstances) was to sell water or electric energy to any individual or private corporation for purposes of resale. Likewise, since the execution of the contract of July 1, 1925, the only question concerning the validity thereof has been whether it was an agency contract or contract of sale for purposes of resale. In other words, these were the only contentions upon which the

Government relied, in the one instance, through twenty-five years, and in the other at any time within the twelve years and over following the execution of the contract.

It would be extraordinary if, after this long lapse of time, there should suddenly arise any valid interpretation which the Government had so long overlooked.

(d) In its opinion, the District Court followed the argument of the Department of Justice that Section 6 forbids sale for resale and that the contract of July 1, 1925 violated that act because it was a contract of sale for resale and not a contract of agency. The Government's argument that agency is prohibited was noted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9), but was given no other consideration.

The District Court said:

"The chief issue to be settled by the court in the present controversy is this: Does the City's present disposal of electric power under the contract of July 1, 1925, made by the City and the Company, violate Section 6 of the Raker Act?" (R. 97:19-23; 23 F. Supp. p. 44, c. 2, lines 7-12).

Again:

"[The court must] turn to the agreement between the City and the Company to determine whether it is a contract for the sale of electricity for resale or a contract of agency whereby the City distributes its own power through an agent. . . . The Government has alleged that the City is not distributing energy through the Company as an agent, but is selling electricity to it for resale in violation of section 6 of the Raker Act. The City denies this allegation and contends that it has entered into an agency agreement whereby it distributes its own power." (R. 106:22-107:13; 23 F. Supp. p. 47, c. 1, line 45, to c. 2, line 10)

Again:

"[In Los Angeles Gas & Electric Corporation v. Los Angeles, 188 Cal. 307 (1922)] a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private companies. The agency contract under which the companies were operating was challenged. The question before the court, **as in this case,** was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that the city charter was not being violated." (R. 113:18-29; __ F. Supp. p. 49, c. 2, lines 19-33.)

Also:

"The contract of July 1, 1925 was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act [and] became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in section 6 of the act." (R. 95:19; 97:2; 23 F. Supp. p. 44, c. 1, line 1; line 40)

Immediately after the second of the above quotations from its Opinion, the District Court entered upon a consideration of the question whether the contract was one of sale or one of agency, and in a very extended review, held it to be a contract of sale for resale and not one of agency (R. 107:14-120:20; 23 F. Supp. p. 47, c. 2, line 1 to p. 51, c. 2, line 54), which of course would have been labor lost if the Court had

been of the opinion or had accepted the belated argument of the Government that the contract violated the Raker Act even though it was one of agency. Indeed, if Section 6 was violated by the contract of July 1, 1925, whether it was one of sale for resale or one of agency, the Department of Justice could have brought the action and pleaded the contract in its complaint (which it did not). The contract would then have been immediately seen to be unlawful because, upon the supposition just stated, it was invalid whether one of sale for resale or one of agency.

(e) The two briefs filed by the Department of Justice in the Circuit Court of Appeals on March 14, 1939 and July 10, 1939, maintained its position unbrokenly that Section 6 forbids sale for resale.

We need not go over these two briefs to establish the proposition just stated because we take the second of the two briefs as indicating the line of argument in the first, and the extracts from the latter brief, supra, pp. 4, 5, show that the Department of Justice therein repeatedly asserted that Section 6 forbids sale for resale.

We therefore submit that the proceedings in Congress and the positions of the Department of the Interior and the positions of the Department of Justice in this action show that all of them have interpreted Section 6 as one forbidding sale for resale, without more.

We now pass to the consideration of the meaning of Section 6 considered textually and without reference to any view expressed thereon in Congress, or in the Department of the Interior, or by the Department of Justice.

(4) The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale. In the discussion of this point we lay on one side Congressional debates and the interpretation put upon Section 6 in the Department of the Interior and by the Department of Justice in this action.

Brief for Plaintiff (U.S.) November 1, 1937 (D.C.).

We have heretofore quoted, supra, p. 16, and here quote again, from the Government's "Brief for Plaintiff", the first filed by it in the District Court November 1, 1937, where it is said (page 58):

> "It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale. **In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified.**"

This brings us to a consideration of the forty-nine words which make up Section 6. We emphasize the words because howsoever they may be construed they decide three of the four questions in the case stated supra, pp. 1-3. We seek to determine what the words mean.

> "Most of the difficulties in this world are caused by the improper use of words" (Socrates).
>
> "Half the controversies in the word are verbal ones and could they be brought to a plain issue, they would be brought to a prompt termination." (Newman. Oxford University Sermons, p. 149).

The frontispiece shows that the words were taken from Section 6 of The Owens River Grant to Los Angeles and those words were themselves dictated by President Theodore Roosevelt for insertion in the Los Angeles Grant.

The differences in words in these three forms may be helpful and we therefore contrast them.

Contrast of Section 6 of The Owens River Grant with President Theodore Roosevelt's Dictation, and Contrast of Section 6 of the Raker Act with Section 6 of The Owens River Grant.

The departures from President Theodore Roosevelt's Dictation in the drafting of Section 6 of The Owens River Grant to Los Angeles follow. The Dictation is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "[Sec. 6] That the City of Los Angeles is prohibited from ever selling or letting to any corporation or individual except a municipality, the right for ~~that~~ [such] corporation or ~~that~~ individual ~~itself~~ to sell or sublet the water [sold or] given to it or him by the City ~~for irrigation purposes~~."

The departures from Section 6 of The Owens River Grant to Los Angeles in the drafting of Section 6 of the Raker Act follow. Section 6 of The Owens River Grant is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "Sec. 6. That the ~~city of Los Angeles~~ [grantee] is prohibited from ever selling or letting to any corporation or individual, except a municipality [or a municipal water district or irrigation district] the right ~~for such corporation or individual~~[10] to sell or

[10]The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Theodore Roosevelt's Dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the five Hetch Hetchy Bills introduced in the House, 63rd Congress, 1st Session, 1913 by Mr. Raker, i.e., H.R. 112, 4319, 6281, 6914 and 7207; but were stricken from Section 6 of the then Bill (7207) on motion

sublet the water [or the electric energy][11] sold or given to it or him by the ~~city~~ [said grantee]."

In President Theodore Roosevelt's Dictation, in Section 6 of The Owens River Grant, and in Section 6 of the Raker Act, the language clearly shows and the words employed in each case are implicit with recognition of the fact that each of the municipalities was to engage in the sale of water and that San Francisco was to engage in addition in the sale of electric energy, all on a large scale and with lawful authority to do so.

In Section 6 of The Owens River Grant and in Section 6 of the Raker Act, Congress was making provision in respect of sales by the municipality involved (in each instance of water, and in the case of San Francisco of electric energy as well) to a corporation or an individual and in respect of each sale was prohibiting "a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed", (Govt. Supp. Br. C.C.A., p. 7, lines 10-15, quoted supra, p. 5).

The whole idea was that title of the Municipality to the water or electric energy should not pass to another (private corporation or individual) coupled with the right of that other to resell or sublet.

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of Representative Murray of Oklahoma, on August 30, 1913 (50 Cong. Rec. 3999). The change was agreed to by Mr. Raker, who said that the section meant the same whether the words remained or were stricken.

[11] "When this bill was being considered by the committee, I offered an amendment to Section 6, . . . by adding the words 'or electric energy'." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2 ft.)

The language employed in Section 6 of the Raker Act is to be treated as that of President Theodore Roosevelt. In 1906, seven years before the Raker Act was passed, he was expressing the idea that a sale or lease of water for irrigation purposes by Los Angeles should not carry a right to the buyer to resell or sublet. The President was not considering, so we think ourselves entitled to assume, any legalistic questions. It must be assumed that he was aware that a sale or lease of water without restrictions would afford the purchaser a right to resell or sublet. This he desired to prevent and he expressed the purpose in language different than would have attended a similar effort by an outstanding legislative draftsman of long professional and technical training. We submit however that the President expressed his purpose and that he made it clear that the prohibition was aimed at unrestricted sales and leases and that his words enjoined that sales and leases should carry limitations denying rights of resale or subletting, if, when and as necessary.

The Owens River Grant involved the generation of electric energy but there was no provision in the bill against sale or subletting thereof for resale or subletting. This was undoubtedly due to the circumstances under which the prohibition was formulated. It all turned on the question of the disposition of water for irrigation purposes. This was the concrete problem presented to the President and no account was taken by him of electric energy nor of water except for irrigation purposes.

When the prohibition was drafted for insertion in the Owens River bill (after the conference with the President) it was concluded that there should be a restriction against

sale for resale of all water whether for irrigation or otherwise, and accordingly, the words "for irrigation purposes" were stricken.

The prohibition is akin to a covenant against assignment or subletting in a lease; and akin to a deed, with building and other restrictions qualifying and restricting the general words of a grant and the enjoyment thereof.

The prohibition of Section 6 in the Raker Act of 1913 is to be interpreted as Section 6 of The Owens River Grant and the Dictation of President Theodore Roosevelt, both dating from 1906, would be interpreted.

The meaning of Section 6 of the Raker Act is clear if attention is riveted upon the concluding words of the provision which are ". . . . the water or the electric energy sold . . . to it [any corporation] or him [any individual] by the said grantee", i.e., San Francisco. These words presuppose sales by the Municipality and forbid the Municipality in connection with certain of its sales to pass to the purchaser the right himself to sell.

If a sale were made "to any corporation or individual", the prohibition applied, but if the sale were to "a municipality or a municipal water district or irrigation district", the prohibition did not apply.

We submit that the last clause in Section 6, read with the other language therein without the addition of implied words, clearly shows that the purpose of the section was to forbid sale by the Municipality for resale by the purchaser in the instances to which the prohibition applied.

If we add to the language of Section 6 the words supplied, supra p. 10, as upon an ellipsis, the meaning is made doubly certain.

(5) It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency nor to forbid the same (see Opinion of Circuit Court of Appeals, supra pp. 11 ft., 12 ft.). The argument for a latitudinarian construction of Section 6 contended for in the Petition for Certiorari is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that the Government has never contended to the contrary of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C.C.A. p. 8, quoted supra p. 7): concessions seemingly renewed by implication in Petition for Certiorari, p. 7, footnote 5, last line.

In the Circuit Court of Appeals the Government claimed that there were words in Section 6 which properly construed forbade a contract of agency. These words were "selling or letting" and "sold or given", particularly "letting" and "given".

The argument of the Government first advanced in the District Court four months after the final hearing in Reply Brief for Plaintiff (U.S.) February 26, 1938 (supra p. 6) "that even an agency agreement might be beyond the limitations imposed by Section 6 of the Raker Act" was

noted as just quoted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9) but no comment upon the soundness thereof was made. The case in the District Court was decided upon the theory upon which the complaint was brought, namely, that the contract of July 1, 1925 violated Section 6 of the Raker Act because it was a contract of sale for resale and that section forbade sale for resale.

We shall later deal with the Government's contention that there is language in Section 6 which should be construed to be a prohibition of agency, but, in the meantime, we wish to call attention to the concessions of the Government made in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that the Government has never contended to the contrary of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C.C.A. p. 8): concessions seemingly renewed by implication in Petition for Certiorari, p. 7, footnote 5, last line.

In considering these concessions it is to be remembered that the generation and consumption of electric energy are practically simultaneous. It cannot be said that one precedes the other by a moment of time. The ultimate consumer obtains the energy by throwing or turning on his switch or plugging his socket, or pressing his button, etc., which being connected with the generator in the power house, automatically causes the generation of the energy—the throwing or turning on of the switch or the plugging

of the socket or the pressing of the button, etc., the generation of the energy in the power house and the transmission to the consumer being practically simultaneous, as already stated.

The Newark station of the Company where the Municipality delivers its electric energy is forty miles from San Francisco (Vincent, R. 282:11). Electricity travels with the velocity of light, i. e., at the rate of 186,000 miles per second, and hence the time involved between Newark and San Francisco is 1/4650ths of a second.

In *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), speaking of electric energy, this Court noted that "the generation and transmission are apparently simultaneous and both respond instantaneously to the turning of a consumer's switch" (p. 165, syl. 1).

These views have the support of Dr. Robert A. Millikan, the famous American physicist, whose testimony is quoted in *South Carolina Power Co. v. South Carolina Tax Commission* (D. Ct. S.C., 1931), 52 F.2d 515, 523, c. 1, line 22, at p. 523, c. 1, line 45 to p. 524, c. 1, line 23).

Dr. Millikan's views have the support of Sir Joseph John Thomson, F.R.S., the great British physicist. See "Electricity" in The Encyclopedia Britannica, 14th Edition, Vol. 8, pp. 190, col. 1 and 304, col. 1.

With these characteristics respecting the generation, transmission and consumption of electric energy, it is pertinent to ask the question which follows:

If the Municipality may employ the Company as "an agent for transmission purposes" (see Petition p. 7, footnote 5), what type of agency is forbidden by the words of Section 6?

The Company transmits the energy of the Municipality to the switch of the consumer and the Government concedes that that may be done lawfully. The Government says, however, that the agent "sells the water or energy"; but this is not true in a legal or in any other sense. The Municipality has employed a distributor who makes the energy available to the consumer when he throws his switch and a sale occurs through the offer of the energy by the Municipality and the taking in thereof by the consumer.

There is nothing in Section 6 which says an agent may transmit but he must not bill the consumer nor collect from him.

There is one practical test to which the whole argument of the Government might be put. Let us assume that the Municipality was distributing its own energy in competition with energy distributed by the Company for its own account. Would the Raker Act prohibit the Municipality from employing a canvasser for business or an agent (corporate or individual) to sell its electric energy?

There is no warrant for the argument that Congress intended in Section 6 of the Raker Act to impose a requirement on the Municipality to engage in public distribution without the use of an agent. If it did so, of course it excluded the employment of any individual as an agent for the distribution of energy, and excluded the employment of any private corporation, even one which might build a distribution system, and have no energy of its own to distribute.

In challenging the power of the Municipality to sell its electric energy through the Company, as its agent,

the Government would seemingly thereby disqualify the Municipality from selling at all, inasmuch as a corporation, including a municipal corporation, such as the District of Columbia, "can act only by its agents or servants". (*Barnes v. District of Columbia*, 91 U. S. (1 Otto) 540, 545 (1876). See, also, *Dearborn v. Grand Lodge*, 138 Cal. 658, 663 (1903); *Scott Stamp Co. v. Leake*, 9 Cal. App. 511, 516 (1908); *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 617, 31 Pac. 367 (1892); 6A *Cal. Jur*, "Corporations", § 13, p. 60; § 642, p. 1131; 43 *Corpus Juris* "Municipal Corporations", § 235, p. 236; § 1186, p. 707.)

Moreover, it is contrary to all ideas to forbid one to act through an agent. "He who acts through another acts by himself". 1 McKinney New Calif. Digest p. 3. "Qui facit per alium, facit per se". 51 *Corpus Juris* 294.

If it were proper to say that some agencies are not prohibited but other agencies are forbidden, it would be necessary to find words in Section 6 to carry this new idea; in fact, the idea partakes of both a negative and a positive character, for although, if no agency is prohibited, there is no need to mention agency at all, nevertheless it is clear that if some are prohibited and others are not prohibited, the fact must be shown by language in the section at once positive and negative. There is no such language.

Passing this phase of the question, we return to the words of Section 6 out of which the Government seeks to spell a prohibition against agency, and in that connection, it is to be noted that Section 6 is a prohibitory law and those things only are forbidden which are specified as prohibited. The prohibition is levelled against "selling

or letting" alone; and nothing is forbidden which is not embraced within "selling or letting".

There is no prohibition against agency.

Section 6 merely prohibits the Municipality from "selling or letting". Therefore, there is no scope of language to sustain wider prohibition. Specifically there is nothing to justify the idea that agency is prohibited. The Circuit Court of Appeals so held (R. 674, line 15; 676, line 25; 106 F.2d 575, c. 1, line 19; 575, c. 2, line 49, quoted supra, pp. 11 ft., 12 ft.).

In support of this ruling we call attention to the four groups of three words each in Section 6, which we indicate by underlining below.

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The first group "selling or letting" furnishes the subject of the prohibition; "selling or letting" (something) is forbidden and that is all that is prohibited. "Selling or letting" does not need interpretation.

Letting is another way of saying leasing, which is doubly clear when we connect "letting" with the word "sublet" later appearing in the section. See opinion of Circuit Court of Appeals (R. 677, line 6; 106 F.2d 576, c. 1, line 5, quoted supra, p. 13, line 3).

The words "selling or letting" are to be tied to the words "sell or sublet". "Sell" is a second "selling"—it is resale; "sublet" is a second "letting".

The words "selling" and "letting" are plain and simple. They prohibit a "selling" with "the right to sell" [resell]. They forbid a "letting" with the right to "sublet". The prohibitions apply to water or energy "sold" [transfer of title for a consideration] or "given" [embracing say transfer of title without consideration].

The plain meaning of the section is that whatever interest in water or electric energy is passed on by the Municipality to a transferee shall be for that transferee's personal use ("buyer's own consumption")[12] and not to be by "it or him" transferred anew.

The prohibition is against "selling", i. e., against a sale, and against "letting", i. e., against a lease. In a sale "one

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[12] *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U.S. 165, (1915) involved a contract of sale where the vendee "bought the goods exclusively for purchaser's own use."

Fosburgh v. California & Hawaiian Sugar Refining Co., (CCA 9, 1923) 291 Fed. 29 dealt with a contract by a sugar refining company to sell sugar to a candy company wherein it was provided that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same".

An unlimited sale of a patented article is free from all restrictions and the purchaser is entitled to resell (*Keeler v. Standard Co.*, 157 U.S. 659 (1895); *Free Co. v. Bry-Block Co.* (D. Ct. Tenn. 1913) 204 Fed. 632) but suitable restrictions are very commonly employed to cut off any right to resell.

United States v. General Electric Co., 272 U.S. 476, 489 (1926) holds that the manufacturer of a patented article may seek to dispose of his product directly to the consumer.

Wines and liquors are sold "not to be drunk on the premises where sold" (*John Rapp & Son v. Kiel*, 159 Cal. 702, 704 (1911); see, also, *Sandelin v. Collins*, 1 Cal. 2d 147 (1934); *Bath v. White*, 3 C.P.D. 175 (1877-1878); 18 *Halsbury's Laws of England* 116.

transfers to another an interest in property". In a lease "one transfers to another an interest in property", but it is usually a lesser interest than is imported by a "sale". This is all shown in the law of real property and the illustrations may be adapted to personal property.

Holt v. City of Montgomery, 212 Ala. 235, 102 So. 49 (1924): "A lease is a . . . grant of an estate in land": *Waskey v. Chambers*, 224 U.S. 564, 565-566 (1912): "The right of a lessee is the same as that of a purchaser in fee".

The second group of three words in Section 6 above underlined are "sell or sublet". As we have just made clear, these words require no interpretation. In the context, "sell" refers to a second sale—a resale, and "sublet" to a second letting, i.e., leasing.

These words mean "[re]sell or sublet". Plainly, the word "sublet" means a second letting. The first letting is the one from the Municipality to X and the second letting would be one from X to Y, if allowed. So likewise in respect of the word "sell". That is a second sale; the first sale being from the Municipality to A, and the second sale being from A to B if allowed.

The Petition for Certiorari, with studied purpose, has nothing to say about the meaning of "letting . . . the right to . . . sublet" ["the water or the electric energy sold or given to it or him by [San Francisco] the said grantee"].

It has little to say about the prohibition against "selling . . . the right to sell" . . . ["the water or the electric energy sold or given to it or him by the said grantee"].

For the word "selling", as we shall later see, the Petition for Certiorari assiduously employs the word "granting" which was thought (so we submit) better to harmonize with its interpretation than the word "selling" which it finds in the section. In connection with the foregoing we desire to make the point, that both of the clauses have to be taken into account in the interpretation of the section; that the section deals with water and electric energy acquired from the municipality by X and in that connection prohibits the "selling [to him] . . . the right to sell"; and that it deals with water or electric energy when using the word "letting" and the word "sublet" and that the section deals with water and electric energy acquired by lease from the municipality by X and in that connection prohibits "letting . . . the right to . . . sublet".

The third group of words "sold or given" presents no difficulty. The word "sold", standing alone, could not give rise to discussion. This is equally true in respect of the word "given".

The word "given" first appeared in President Theodore Roosevelt's Dictation, where it was not associated with the words "sold or" but stood alone. The words "sold or given" appeared for the first time in Section 6 of The Owens River Grant.

The word "given", when used in the Dictation, clearly referred to the words "selling or letting" and meant as indicated by the supplied words which follow: "the water given [i.e., by way of sale or lease, as aforesaid] to it or him by the city" and referred to nothing else than the

act of "selling or letting" which was the correlative of the word "given".

The word "given" does not enlarge the prohibition of "selling or letting"; it merely identifies "the water or the electric energy".

Striking proofs that the words "sold or given" are words to identify "the water or the electric energy" arise from the statement of the Government that "The right to sell, granting of which is prohibited by section 6, is not the right to sell all water or energy from whatever source derived, but only the right to sell the Hetch Hetchy water or energy obtained from the City" (Govt. Supp. Br. C.C.A. p. 4, lines 3-7, quoted supra, p. 4); and that "the breach occurs not in the sale, but in transferring with it the right to sell" (Govt. Supp. Br. C.C.A. p. 9, lines 11-13, quoted supra p. 5).

The addition of the words "sold or" in Section 6 of The Owens River Grant did not alter the meaning of "given" as it stood in the Dictation; and that word referred to both "selling" and "letting", but inasmuch as sale is specifically mentioned, the effective function of the word "given" thenceforth was to be the correlative of "letting". Of course, when the word "given" stood alone in the Dictation, it had as correlatives both "selling" and "letting", but the draftsman of Section 6 of The Owens River Grant, with a passion for repetition or to make assurance doubly sure, added the words "sold or", thus giving us "sold or given". If the word "given" in this connection had no historical background and its meaning were doubtful, interpretation would attribute to it a definition akin or having relation to the word "sold", say, as

involving, transfer of title. The maxim of *Noscitur A Sociis* (46 Corpus Juris 496) would apply ("The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it")—a maxim akin to *Ejusdem Generis* (19 Corpus Juris 1255).

The word "give" has many meanings, but when it is read in the environment in which we find it here, it deals with transfer of title through "selling or letting".[13]

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[13] "The word 'grant' is synonymous with 'give'. (Webster's Dictionary)". *Gurnsey v. Northern California Etc. Co.*, 7 Cal. App. 534, 544 foot (1908). "Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept'." *Standard Oil Co. of Indiana v. United States* (C. C. A. 7, 1908), 164 F. 376, 390 foot; *United States v. Bunch* (D. Ct. Ark. 1908) 165 F. 736, 739 foot. "The word 'given' as used in statute modifying the rule in Shelley's case [such as Section 779, C. C. Cal.] means conveyed." (Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738, syl. (1919).)

"The word 'give' is as expressive of a transfer of title as the word 'sell'" (In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617, 622, c. 2, ls. 49-51 (1897)), and while in proper context, it would mean a transfer of title without consideration, it does not exclude a transfer of title upon consideration. Latimer v. Bruce, 151 Ga. 305, 106 S. E. 263 (1921) held that an answer alleged "a contract upon a valid consideration" although the promise alleged was that "he would give her the property". The opinion says that "the word 'give' as employed in the answer, when considered in connection with the context, does not denote a technical gift" (p. 263, c. 2 middle). In times past words of conveyancing were "to give, grant and confirm" land to A. If the consideration was money, the deed operated as a bargain and sale, and if not for money, it was good as a covenant to stand seised. Harrison v. Austin, 3 Mod. 237, 87 Reprint 154 (1793); Cheney's Lessee v. Watkins, 1 Harris & Johnson 527, 2 Am. Dec. 530 (1804); Young v. Ringo, 17 Ky. (1 T. B. Mon.) 30 (1824); Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406 (1871). In Carter v. Alexander, 71 Mo. 585 (1880) it was held that the word "give" in a contract so far as it was related to land should be taken in the sense of "convey".

Evenson v. Webster, 3 So. Dak. 382, 53 N. W. 747 (1892) held that the instrument under review was a grant, although the word used was "give".

The fourth group: Next, there can be no dispute about what is meant by the words "it or him" which constitute the fourth and last group of three words each underlined above. They refer and are to be tied to "any corporation or individual", so that they should be read—"it [any corporation] or him [any individual]."

With these four groups of three words each shown to be of clear and unmistakable import, and none of them giving rise to any prohibition of agency, nothing remains upon which the Government can base a claim that Section 6 did anything more than to prohibit sale for resale.

There are prohibitions in Section 6; the prohibitions go as far as they go and no farther; they forbid sale for resale; plain words are used and no interpretation of those words is needed. "The restraint upon alienation must not be exaggerated" as said in *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907), where it was held that a prohibition against sale of tribal lands by Indians did not forbid the cutting of timber for sale and the sale thereof.

(6) In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function" (298 U.S. 237). The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

Cutten v. Wallace (CCA 7, 1935), 80 F.(2d) 140. 143 footnote, assembles numerous cases to the point that

"where there is no ambiguity in words of statute, there is no room for statutory construction".

In *Wallace v. Cutten*, 298 U.S. 229 (1936) Mr. Justice Brandeis, affirming the judgment in the last case cited and speaking for a unanimous Court, said (pp. 236-237):

> "The Government argues that . . . the literal construction thus given [in the court below] to §6(b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act. . . .
>
> It would be inappropriate for us to discuss these, and other, arguments presented. The language of §6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said [by us in another case] . . . 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'"

The following is to like effect:

In *Seaboard Acceptance Corporation v. Shay*, 214 Cal. 361 (1931), the Court said (p. 365):

> "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used. . . . It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the legislature must be determined from the language of the statute."

The prohibition of Section 6 of the Raker Act is free from ambiguity and there is no room for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." (*Thompson v. United States*, 246 U.S. 547, 551 (1918).)
>
> ". . . in support of his contention, petitioner invokes history of the legislation, but that is not here permissible for the language and meaning of the statute in respect of the question under consideration are clear." (*Wilbur v. United States*, 284 U.S. 231, 237 (1931).)
>
> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." (*Helvering v. City Bank Co.*, 296 U. S. 85, 89 (1935).)
>
> ". . . as this court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive." (*Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).)
>
> "The terms of the act are free from ambiguity, and in such cases the courts are not at liberty to resort to or examine the proceedings in Congress." (*Jeu Jo Wan v. Nagle* (CCA 9, Opinion by Rudkin, C.J. 1925) 9 F.(2d) 309, 310, c. 1 top.)

"The applicable provisions . . . are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the act is unambiguous and its meaning plain, is to be gathered from the act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this act speaks for itself; it does not call for construction." (*Commissioner of Internal Revenue v. Adams* (CCA 1, 1931), 54 F.(2d) 228, 229, c. 2 foot.)

"There seemingly is no canon of statutory construction better settled than the one which forbids reference to Congressional Records or to statements of legislators except in cases where the language of the statute is doubtful, uncertain or ambiguous." (*United Electric Coal Companies v. Rice* (CCA 7, 1935, cert. denied 297 U.S. 714), 80 F.(2d) 1, 8, c. 2 foot.)

"The legislative intent must be gathered from the plain meaning of the words used in a statute." (Syl. *Durr Drug Co. v. United States* (5 CCA, 1938), 99 F.(2d) 757.)

Upon the foregoing authorities, we submit that in claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function" (298 U.S. 237). The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

(7) The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are some provisions of the statute to support them.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

United States v. Chase, 135 U. S. 255, 261 (1890).

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Hadden v. Barney, 72 U. S. (5 Wall.) 107 (1866).

"I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

Lord Tenterden, C. J. in *Brandling v. Barrington*, 6 B. & C. 467, 108 Eng. Rep. 523, 527 (1827).

"I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14."

Holroyd, J., *same case* (p. 527).

"The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act."

Crawford v. Spooner (1846), VI Moore 1, 13 Eng. Rep. 582, 585.

See, also:

Estate of Barnett, 97 Cal. App. 138, 142 (1929);

M'Cowan v. Baine [1891] App. Cas. 401, 409;

Tompkins v. First Nat. Bank, 18 N.Y.S. 234, 235 (1892).

(8) There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, nor that the congressional policy which underlies Section 6 is any broader than that expressed therein.

The Municipality did not possess and could not generate a supply of electric energy equal to the requirements of its inhabitants. The City energy is only about one-half of that required to supply the San Francisco load (Vincent, R. 295:4-6). The Municipality's maximum amount of energy is from 67,000 kilowatt hours (Vincent,

R. 295:26) to 73,000 or 74,000 (Vincent, R. 303:18). In winter evenings the peak load is about 225,000 (Vincent, R. 295:23) and the Municipality's contribution would therefore not amount at those times to one-third of the requirements.

"Nothing whatever is said in the Raker Act with reference to the acquisition or construction of a distributing system" (Opinion, C.C.A., R. 664, lines 5-7; 106 F.2d 571, c. 2 foot).

On July 1, 1925 "the City had no distributing lines or system and had not completed its transmission lines beyond Newark" but "it had constructed its power plants and had impounded water sufficient to generate a large amount of electric energy which would be wholly lost if the water, as it passed through the dam and canals of the Hetch Hetchy project, were not utilized for that purpose. In this situation, on July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy generated at the Moccasin power plant of the Hetch Hetchy project" (Opinion, C.C.A., R. 665, line 20 to 666, line 2; 106 F.2d 572, c. 1, lines 39-54).

All that the Company was to receive under the agreement was "compensation covering its operating expenses and use of capital"[11] (Opinion, C.C.A., R. 667, lines 16-17; 106 F.2d 572, c. 2, lines 47-49).

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[11]This was proved by the testimony of N. Randall Ellis, Chief Valuation and Rate Engineer for San Francisco, attached to the City Attorney's Office (R. 435). It is difficult to ascertain what portion of his testimony was stricken out and what portion remains but, at least, it can be said that the fact was proved, that it was pertinent, should not have been stricken, and for purposes of the petition for certiorari should be regarded as proved.

The price and terms under which the energy was to be distributed to the inhabitants of the Municipality are fixed by the language of the agency agreement, and the Municipality's absolute control over the situation is made doubly sure by the one day right of termination. The Company had no alternative but to furnish the additional electric energy, which added to the municipal energy, would equal the requirements of the inhabitants of San Francisco.

There is no manifestation of congressional purpose which would be set at defiance by this simple and unavoidable expedient.

The Petition contends that municipal energy "should be sold exclusively by the City directly to consumers" (Petition, p. 12, lines 21-22).

There is a marked difference between public ownership and public operation. Obviously, Section 6 does not command public operation and there are no prohibitive words therein which would drive the Municipality thereto, leaving it no alternative.

The words of Section 6 are to have the meaning which like words had in the letter of June 25, 1906, President Theodore Roosevelt to the Secretary of the Interior (R. 657-660), and in Section 6 of The Owens River Grant to Los Angeles.

We are dealing with words; we are engaged in finding their meaning. It is plain from the frontispiece that the words in Section 6 of the Raker Act have the date of 1906 and whatever those words meant when they were embodied in President Theodore Roosevelt's letter and in Section 6 of The Owens River Grant, they meant when they were

copied into Section 6 of the Raker Act. The Petition does not suggest that there is any provision in the Act applicable to the point in hand except the prohibition of Section 6, and we submit that what it meant in 1906 it meant in 1913.

Congress has power to adopt a legislative policy, and it alone has power likewise to determine just what concrete measures in line with that policy shall be enacted.

It is not for the Government to cast about for a legislative policy and then argue that unmistakable concrete enactments in line with that policy shall be enlarged so as to make them commensurate with the real or supposed legislative policy.

The idea that Section 6 required the Municipality to operate its own distributing system was rejected in the Opinion of Secretary Ickes as follows (R. 244:19-27):

Secretary Ickes' Opinion.

> "The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, **while true** (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment." (Underlining ours.)

The Petition quotes language used while the Raker Act was under discussion in the Senate, but none of the quotations had anything to do with the meaning of or the purpose to be covered by Section 6. These are so clear that they do not stand in need of interpretation or resort

to Congressional debates (see quotation from Brief for Plaintiff, United States, November 1, 1937, D. Ct., point 3, supra, pp. 16-17; point 4, supra, p. 40). Moreover, these debates cannot be resorted to in the circumstances here present (see authorities Point 6, supra, pp. 56-59).

(9) There is no sound argument in the Petition for Certiorari to overthrow the proposition (a) that it is the purpose of Section 6 to and it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency. With this being shown, nothing remains for us to do except to answer question third, supra, page 2, by showing that there is no remaining argument in the petition respecting the interpretation of Section 6 which, if sound, would call for a reversal of the decree of the Circuit Court of Appeals. Indeed, we expect to show there is no remaining argument at all.

(a) In considering the Petition for Certiorari it is necessary to have in mind the theories of the parties from beginning to end in the courts below. Hence we state them in a summary way.

From the beginning until after the final hearing in the District Court, the Government's theory of the case was (a) that Section 6 forbade sale for resale (without more); and (b) that the contract of July 1, 1925 was invalid because it was a contract of sale for resale. The Municipality agreed that Section 6 forbade sale for resale, but denied that the contract was one of sale for resale, and claimed it was one of agency. At the final hearing the sole question (disregarding defenses overruled by the District Court[15] and not dealt with in the Circuit Court of

[15]The opinion of the District Court classifies the positions taken in that Court by the Municipality as (a) a primary defense (R. 93:12; 23 F. Supp. p. 43, c. 1, line 28) and (b) secondary defenses (R. 93:24; 23 F. Supp. p. 43, c. 1, line 43). The over-

Appeals) was whether the contract was one of sale for resale or of agency.

Four months after the final hearing and in its closing brief, the Government made its new contention that Section 6 also forbade a contract of agency and that therefore the contract was invalid even if a contract of agency.

The District Court held that Section 6 forbade sale for resale and that the contract was one of sale for resale,[15] and entered its decree for the United States. It mentioned the argument of the Government that the section also forbade a contract of agency but it did not enter upon a consideration of the point.

Upon appeal, the Government and the Municipality agreed that Section 6 forbade sale for resale. The Government contended that it also forbade a contract of agency, which the Municipality denied. The Municipality reasserted its position taken in the District Court that the contract was one of agency and did not violate Section 6 inasmuch as the section did not prohibit a contract of agency.

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ruling of these secondary defenses was assigned as error and would have been properly considered by the Circuit Court of Appeals if it had not overruled the District Court in respect of the primary defense, which is the one here under consideration.

The Circuit Court of Appeals said in footnote 4 to its Opinion: "The City has made other contentions which, in view of the conclusions of this Court, are not necessary to consider" (R. 666, 106 F.2d 572).

[15]We are constantly considering whether the contract of July 1, 1925 was one of sale for resale. Had the contract been a contract of sale, it would have been one of sale for resale because obviously the Company was not receiving the energy at Newark for its own consumption. Therefore, if the contract were held to be one of sale, it would follow that it was one of sale for resale.

The position of the United States in the Circuit Court of Appeals was "that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City" etc. (Opinion, supra, p. 12).

The Circuit Court of Appeals accepted the argument of the Government "that the terms of Section 6 prohibit . . . sale for resale" but decided against its contention "that the terms of Section 6 prohibit . . . the creation of an agency by the City" etc. (Opinion, supra, pp. 11-13). The court also decided against the Government's contention that the contract was one of sale for resale and held it to be one of agency. Thus the Circuit Court of Appeals reversed the decree of the District Court.

In the Petition for Certiorari it is argued that Section 6 does not forbid sale for resale; that the terms of the section do not deal with sale for resale; and that "the 'selling' prohibited is not the selling of energy for resale but the selling of the right to sell energy" (Petition, p. 8).

We submit that the Government should not be heard to make this argument when it pressed the opposite argument on the Circuit Court of Appeals and there obtained a concurrence in its view. The case presented is not one merely of a point never raised before but one categorically in opposition to one maintained without interruption in both courts below. "This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it" (*Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380); and "He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here" (*Helvering v. Tex-Penn-Co.*, 300 U.S. 481, 498).

(b) In its Petition for Certiorari, the Government might have renewed its argument made in the Circuit Court of Appeals "that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City" etc. (Opinion, supra, p. 12), but there was a reason and an important reason why it did not do so; why it executed a volte face. The reason was that if Section 6 forbade sale for resale, that fact accounted for all of the words in the prohibition and there were no other words which it could seize upon to justify or to give countenance to the argument that the prohibition also covered a contract of agency. In other words, the Government recognized that it could not maintain that Section 6 prohibited agency if it conceded that it forbade sale for resale, because, as we pointed out below and do so again here (supra, point 5, page 45), the prohibition of sale for resale exhausts the content of the section, both of words and ideas. Therefore, the Petition declares (page 8 foot) that "the 'selling' prohibited is not the selling of energy for resale" (supra, p. 3).

(c) The only point ever in dispute respecting the nature of the agreement of July 1, 1925 was whether it is a contract of sale for resale or a contract of agency. There has been no suggestion that it was anything other than one or the other of these two. However, the artificiality of the argument of the Petition is masked in language inappropriate to the subject dealt with.

One would be quickly understood if he said A has appointed B his agent with authority to sell.

The language of the Petition (p. 8, lines 9-10) that the "City grants to a private corporation the right to sell

energy", when the fact is that the City made an agreement with a private corporation whereby the latter, as agent of the former, would perform the acts specified in the agreement, is far fetched, inexact and incorrect; yet it is repeated in one form or another seven additional times in the Petition at the pages and lines following: p. 2, line 21; p. 2, line 25; p. 7, line 25; p. 8, line 22; p. 9, line 2; p. 10, line 3; p. 13, line 7.

To say that in the agreement here involved, the "city grants to a private corporation the right to sell energy" (Petition, p. 8, line 9) is a caricature of language. It is likewise a falsification of the Municipality's contention to say that it argues that Section 6 "does not prohibit the granting of the right to sell energy as agent" (Petition, p. 10, lines 2-4). The Municipality's contention has never been expressed in such language. The Municipality's contention has been that Section 6 does not forbid a contract of agency; it has never expressed that contention by saying that the section "does not prohibit the granting of the right to sell energy as agent".

(d) In the Specifications of Error (Petition p. 7 foot) like misuse of language is to be noted. It is said that the Circuit Court of Appeals held that Section 6 "does not prohibit the granting to private corporations of the right to sell electric energy originating at Hetch Hetchy as agent for the City". The Court did not couch its conclusions in any such language nor in language which justified description thereof by the language quoted. The Court held that a contract of agency was not forbidden by Section 6 and said nothing about "the granting . . . of the right to sell . . . as agent for the City" as shown

in the Petition where it is said it (p. 4, lines 1-3) "reversed on the ground that the Act does not prohibit the sale of energy by the Company as agent for the City".

(e) The statements in the Petition that Section 6 "leaves no room for any exception under which the City may grant to a private corporation, for a consideration, the right to sell such energy as its agent" (Petition, p. 8, lines 21-24) and that "the prohibition applies to any arrangement whereby, for a consideration, the City grants to a private corporation any right to sell, in any capacity, energy made available to it from Hetch Hetchy" (Petition, p. 9, lines 1-4) are merely enveloping phrases to avoid a bald statement of a simple question, i. e., does Section 6 forbid an agency.

(f) In thus ringing the changes on and repeating the words "grant" or "granting", the Petition does not mention the fact (which it might have done) that **neither the word "grant" nor the word "granting" is contained in Section 6.**

The word which the Petition should have used on the eight occasions above mentioned was either the word "sell" or "selling". In other words, it should have spoken of "selling to the Company the right to sell energy", but seemingly, so we assume, the argument would lose caste if the Petition had used the word "sell" or "selling" in the place of "grant" or "granting" and it took the course frequently employed in hard driven arguments, i. e., to omit the true word and substitute a false one.

(g) The word "selling" in Section 6 contemplates a transfer of title. The Municipality says the section refers

to "selling" a commodity. The Petition argues that "selling" refers to "a right to sell". It would seem to follow that in such a case there would be a transfer of the right to sell. If the "grantor", however, only authorized the Company to sell in its name and upon its behalf, there would be only an agency and neither transfer nor "grant" of the right to sell; and the use of the word "grant" would be inapposite to the last degree. The Petition says that "the 'selling' prohibited includes any such grant, even though the legal title to the energy does not pass through the company" (p. 9, lines 5-7). This means, if it means anything, that selling does not pass title to the energy if energy is not the thing sold!!! It is necessary first to ascertain what the subject of the sale really is and next to determine whether legal title thereto does pass. If it does not, there is something wrong with the selling. Selling and the transfer of title to the thing sold are inseparable. If there is a selling of a right to sell, a transfer of the right to sell is implied. Therefore, if the circumstances show that a transfer of the right to sell is not intended but a mere authority, concurrent with the reserved right of the principal, then there is no grant of the right to sell and the whole argument falls to the ground.

In this connection it is not true, as stated in the Petition, that the argument of selling and transfer of title "is a strained construction of the Act" (Petition, p. 13, line 10); and one "which is hypertechnical at best, and which we believe to be clearly erroneous" (Petition, page 14, lines 3-4). The Petition says that the City "seeks to make the issue turn solely upon the question whether legal title

to the energy passes through the Company" (Petition, p. 10, lines 4-6), and that "any question relating to the title to the energy is wholly irrelevant" (Petition, p. 10, lines 8-9), and that the Act operates under the word "selling" "regardless of where the title to the energy lies" (Petition, p. 10, lines 14-15).

All of this turns on what is sold: is it energy or "the right to sell energy". If energy is sold, of course the title thereto passes, and if the right to sell is the thing sold, title to the right to sell is transferred, which is inconsistent with any idea of agency whereunder the agent is merely endowed with authority and the grantor reserves "the right to sell".

(h) While the Petition uses "grant" in describing what took place under the contract of July 1, 1925, it does take account of the word "selling" in dealing with the statute, and finds it necessary to supply a consideration for the selling, which it does, page 9, line 7, in the assumption in the agreement of an obligation by the company to furnish peak load and steam stand-by services and to pay a fixed minimum of energy each month, etc. Thus an agreement held to be one of agency wherein the agent agrees to perform certain duties is turned into a sale of "the right to sell" and the consideration supplied by covenants of the agent in the agreement. Thus the government is put to great straining to work out a sale, in connection with which, note may be taken of the following sections of the California Civil Code (in force until 1931 when superseded by the Uniform Sales Act), which clearly codified the general law as it then was and now is:

"1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."

"1804. Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only."

"1806. The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and a buyer as to that which he takes."

(i) The Petition wisely abstains from testing its argument by applying it to "letting . . . . the right to . . . . sublet".

The moment the word "sublet" is dwelt upon the whole purpose of the section is luminous because it presupposes a lease to A, say, of water or energy which he is not to be permitted to sublet. If instead of "sell or sublet" the words had been "resell or sublet" the argument in the Petition would never have been made (so we must assume), and yet, when we have the word "sublet", we are compelled to say that "sell" means "resell".

In one instance, the Petition (p. 10, lines 11-12) says "The City has sold to the Company a right to make such sales", but in all other instances (we speak subject to correction) the word "grant" or "granting" is used.

In order to have a balanced interpretation of the statute according to the point of view of the Government, the Government must deal with the provision in Section 6 of "letting . . . the right to . . . sublet", and by analogy to the above quotation would it not have to say "The

City has let (leased) to X the right to . . . sublet"? If it did so would it be possible to put any sense into such a sentence except to say that it meant that the City had leased a commodity to X but had withheld by proper restriction "the right to . . . sublet".

(j) The Petition, page 9, lines 18-27, rings the changes upon the word "given" found in Section 6, with the words "sold or". We have fully covered the history, meaning and significance of the word "given" and have shown that it is not a word of prohibition but merely identifies the commodity dealt in (supra pp. 53-55).

(k) The Petition argues that Section 6 forbade any disposition of water or electric energy except through sale "directly to consumers by the City" (Petition, p. 11, line 4); and adds (p. 13 top) "To make this purpose effective Congress used the peculiar language of Section 6—forbidding the 'selling' of 'the right to sell' energy". Kindred declarations appear at page 10, lines 8-11 and line 19; also page 8, lines 17-21; page 12, lines 19-27. There is no support for these declarations in the text of Section 6 nor in any other provision of the statute; and we again note that the Government does not claim that there is any provision of the statute dealing with the subject except Section 6. Furthermore, all these declarations overlook the fact that the language of Section 6 came to be employed in a comparable situation seven years before (1906-1913).

(l) In the Petition, page 4, line 17, the conditions of the Act are spoken of. Although the words "condition" and "conditions" appear in the Act on a number of occa-

sions, it is an undenied fact that there are no other conditions therein (one leading to forfeiture) except that contained in the proviso to Section 6 which declares that "the rights hereby granted shall not be sold . . . and in case of any attempt to [do] so . . . this grant shall revert to the Government of the United States".

The Complaint sought forfeiture but that claim was abandoned in the opening statement at the final hearing (R. 189-190).

(m) It is said (Petition, p. 13, lines 7-9) that "In granting to the Pacific Gas and Electric Company the right to sell the energy, the City has sought to circumvent this purpose". The City did not grant the right to sell; it created an agent with powers, and it did not seek to circumvent the purpose as is shown by its effort immediately after the execution of the agreement to have an authoritative ruling that the contract was one of agency and therefore not forbidden by the statute—a ruling that was not forthcoming until 1935, ten years after the execution of the agreement.

(n) The statement in the closing paragraph of the Petition, page 14, that direct competition by the Municipality with the Company would have an effect on rates for electric energy which "will be of direct concern to the entire population of that area" is far fetched and attenuated. The rates for private utilities are fixed by the Railroad Commission. It has, however, no jurisdiction of rates for electric energy to be charged by the Municipality. In this case, however, the Municipality agreed that the rates to be charged for its energy should be the rates fixed by the Railroad Commission.

(o) At no place in the Petition is there any indication respecting the issues and the questions as they arose below and it is impossible from the Petition, standing alone, to have a proper idea of the points which had been and were still in issue.

(p) The statement quoted from Solicitor Edwards' opinion (Petition p. 7, fn. 5) "that the Act clearly contemplates public ownership, sale and distribution" (R. 346) is misleading for the want of the words with which they were connected, which are "and not merely the development of water and power for sale to private concerns for resale and distribution. The legislative history of this law amply supports this interpretation of the language employed in the Act" (R. 346 foot-347 top).

(q) *Helis v. Ward*, ___ U.S. ___, Adv. Ops. October Term 1939, page 240, 242 (decided December 18, 1939) and the cases therein cited establish that "It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner". The Government does not ask Certiorari in respect of the interpretation put upon the agreement of July 1, 1925 by the Circuit Court of Appeals and it would seem that the mere statement of that question as one which it may later bring forward does not destroy the applicability of the rule stated in the cases mentioned. See supra, pp. 14-15.

(r) The Petition does not deal with the suggestion made by judges of the Circuit Court of Appeals at the oral argument May 19, 1939 that it might be held that the prohibition of Section 6 was not concerned with a sale of water or electric energy but prohibited "selling" ("leas-

ing" not mentioned) a franchise to sell ("sublet" not mentioned) (Opinion, R. 674-675, 106 F. (2d) 575, c. 1, pars. 12-13).

If this suggestion had prevailed a reversal of the District Court would have resulted with, we submit, dismissal of action "even if the contract of July 1, 1925 constituted a sale of electric energy to the Company to be resold by it to the inhabitants of the City" (Opinion, R. 675 foot, 106 F. (2d) 575, c. 2, lines 10-18) inasmuch as the City had not granted the Company any franchise to sell. Counsel for the City were of the opinion that the suggested interpretation of Section 6 was not the true one and would not endure and therefore dissented therefrom. The Government likewise dissented. Leave was given to the parties to file briefs following the oral argument which they did. In the briefs each of them insisted that it was the purpose of Section 6 to and it did prohibit sale for resale (see Extracts from Government's Supplemental Brief, supra, pp. 4-5).

(In the briefs filed before the oral argument, the parties were in agreement that Section 6 forbade sale for resale, without more, and the attention of the judges was not called to the genesis of Section 6 nor to the circumstance that it originated in the letter of President Theodore Roosevelt of June 25, 1906, nor that it had been copied from Section 6 of The Owens River Grant, which was done in the later briefs.)

The judges had in mind Article XIV, Section 1 of the California Constitution of 1879, which provides that "The use of all water . . . is hereby declared to be a public use, and subject to the regulation and control of the state,

in the manner to be prescribed by law" etc. (The section does not mention electric energy.) The text of Article XIV, Section 1, will be found in the Appendix to Govt. Supp. Br. C.C.A. p. 23.

The suggested interpretation of Section 6 would destroy all effectiveness for Section 6 as a few simple facts will show.

In the period 1918-1923, as has already appeared, supra, pp. 23-24, 26-27, the Municipality sold electric energy from the Early Intake plant to the Sierra and San Francisco Power Company, all within Tuolumne County, California. If Section 6 did not at the time prohibit sale for resale, then the Company became possessed of an unqualified title to the energy sold, and lawfully distributed it without any franchise or license from San Francisco; indeed, San Francisco did not have any authority to sell, grant or otherwise confer a franchise on the Sierra and San Francisco Company for operation in Tuolumne County.

Moreover, as the Municipality has Hetch Hetchy water and electric energy which it may sell at points along its lines which cross Tuolumne, Mariposa, Stanislaus, San Joaquin and Alameda Counties, California, the buyers in such instances would not need any franchise denominated as a "right to sell" emanating from San Francisco and unless the sale of the water or electric energy was restricted so as to forbid the buyer to resell, Section 6 would have no operative effect in the suggested cases.

Again, when the Raker Act was passed in 1913, the Spring Valley Water Company had the constitutional franchise provided in Article XI, Section 19 of the Cali-

fornia Constitution of 1879 to distribute water in San Francisco (*Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318 (1915)) which was in perpetuity and could neither be revoked nor impaired by any legislation, constitutional or statutory (*Russell v. Sebastian*, 233 U.S. 195 (1914)); and the Pacific Gas and Electric Company and the Great Western Power Company had franchises under the same constitutional provision to distribute electric energy in San Francisco.

Taking the case of the Water Company, the same observations being applicable to the electric companies, we note the following:

A distributor of water to a community for compensation, when acting as owner and not as agent, requires (a) ownership of water and (b) a franchise to distribute it.

If the owner of water (in this case the Municipality) can only sell that water to a distributor company or individual, for its own use and not for resale, the distributor is denied this source of supply. If on the other hand there are no restrictions upon the sale of the commodity, then the only question presented would be the question of franchise to sell. If, in that event, the distributor (corporation or individual) possessed a franchise, no difficulty would be encountered in marketing the commodity.

It is fair to assume that Congress was alive to the fact, for instance, that the Spring Valley Water Company had a franchise and that therefore the section would be nugatory if it were merely a prohibition against the granting of a franchise. (The Spring Valley Water Company was mentioned on a number of occasions in the debates which resulted in the Raker Act.)

The interpretation that Section 6 deals with franchises may be put to a very simple test. If following the approval of the Raker Act and water being available, the Municipality had sold all the water to the Spring Valley Water Company and the Spring Valley Water Company had distributed it with its own water, under its own constitutional franchise, could there have been any complaint (if we indulge in the assumption that Section 6 deals only with the grant of franchises)? Clearly not, for, in the events suggested, the City would have sold the water to the Water Company and the Water Company, as owner, would have made distribution under its own constitutional franchise. (In later years the plant of the Spring Valley Water Company was acquired by the Municipality and the distribution of water is wholly municipal.)

Take the present situation: If the contract of July 1, 1925 were treated as a sale, there would be no objection to it as one forbidden by Section 6, if we assume that the section deals only with the grant of franchises. The City does not purport in the contract of July 1, 1925 to confer a franchise on the Pacific Gas and Electric Company; it acted on the basis that the Company had authority to distribute.

It follows, then, that the interpretation of the prohibition of Section 6 as one merely against the granting of a franchise would strip Section 6 of all effective functioning.

(s) Finally, it is clear that no plain and common sense interpretation of Section 6 could ever lead to the contentions made in the Petition and quoted above and that these contentions do not overthrow or impair the propositions advanced, supra, i. e., in Points 4 and 5, pages 40, 45, re-

spectively, that it is the purpose of Section 6 to and that it does prohibit sale for resale and that it does not prohibit a contract of agency. We add there are no remaining arguments in the Petition respecting the interpretation of Section 6 which call for reversal of the decree of the Circuit Court of Appeals.

(10) It is submitted that under Rule 38, Certiorari should not be granted herein.

In addition to what we said, supra, pp. 2-3, we add the following:

Section 6 "is a restrictive provision inserted by the Government as grantor in a statutory conveyance" (Govt. Supp. Br. p. 19, lines 23-27).

This view found expression in Congress during the passage of the Act.

Representative Thomson, August 30, 1913:

> "This is not so much a legislative act or grant as it is a contract between the Government and San Francisco and these other cities, etc." (50 Cong. Rec. p. 3979, c. 1 foot.)

Senator Borah, October 4, 1913:

> "The Government is not undertaking to regulate and control the waters of the State of California, but it is simply attaching a condition to a specific grant which it is making to the city of San Francisco, as a proprietor and not as a sovereign." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Smoot, December 1, 1913:

> ". . . San Francisco can make appropriations of the water, and I understand she has already done so. . . . she must have an act of Congress authorizing her to

construct a pipe line over the public domain and build a reservoir. . . . That will give her all the rights Congress can give her.'" (51 Cong. Rec. p. 13, c. 1 middle.)

Senator Lippitt, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Brandegee, December 4, 1913:

". . . if the Government is the proprietor of land I have no doubt whatever of the power of the Government to sell its land or to grant any less estate than a fee simple under whatever conditions it may attach, which are, in my opinion, the same as those which any other proprietor of land may attach." (51 Cong. Rec. p. 183, c. 1 top.)

Senator Borah, December 5, 1913:

"I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land, and I have no doubt of the proposition that the Government can attach no other conditions that an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government." (51 Cong. Rec. p. 286, c. 2 middle.)

Whether the Raker Act is technically a private act or not is of no great consequence. It bears a close resem-

blance thereto. The subject of private bills and private acts is dealt with in the authorities below.[17]

There is no issue here of great general importance but merely a question of the construction of a statutory grant.

The Petition says (p. 8, lines 11-13) "the court below has passed upon an important question of federal law which has not been but should be settled by this Court". We submit that no important question of federal law is involved in the interpretation of Section 6 of the Raker Act.

The Government has no interest to be protected until the contract has been found to be of a character violating the Raker Act, and then its only interest is to annul the contract which would bring it no benefit and inflict great injury on the Municipality. (The Municipality has received for its energy (July 1, 1925-December 31, 1939) in excess of $30,000,000. The figure to December 31, 1937 was $26,000,000 (Vincent, R. 299), and if we add in excess of $2,000,000 per annum for two additional years, we have the figure stated.) This is under a contract which the Municipality has always had the right to cancel on one day's notice.

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[17]On the subject just stated see: *Halcomb's Private Bills* (1836) p. 1; *Potter's Dwarris on Statutes* (1885) p. 52, last line, and following; 1 *Clifford's History of Private Bill Legislation* (1885) p. 267; *Endlich's Interpretation of Statutes* (1888), p. 706, Sec. 503; 2 *Lewis' Sutherland Statutory Construction* (1904), p. 626, Sec. 322; p. 632, Sec. 327; *Craies on Statute Law*, 4th Edition (1936), pp. 59, 477, 488; "Statutes", 26 *Am. & Eng. Encyc. of Law* 531; "Statutes", 59 *Corpus Juris* 738, Sec. 325; "Parliament", 21 *Halsbury's Laws of England* 727, Sec. 1353.

Also *Campbell's Case*, 2 Bl. Ch. 209, 20 Am. Dec. 360, 369 (1829); *Great Eastern Railway Co. v. Goldsmid*, 9 App. Cas. (1884) 927, 936 top; *Herron v. Rathmines and Rathgar Commissioners* (1892) A. C. 498; *Croxall v. Sherrerd*, 72 U.S. (5 Wall.) 268, 285 ft. (1866).

The opinion of the Circuit Court of Appeals (footnote 2, R. 662, 106 F.2d 571) shows that the cost of the project, which was exclusive of a distributing system for electricity as estimated was $77,000,000. Evidence was given that the total amount of the bonds voted for the project was $89,600,000 but the evidence was later stricken out (R. 373, 453).

The Petition (page 13) speaks about preserving "the national parks inviolate from private commercial exploitation". No private commercial exploitation is involved. The Moccasin Power House is on privately owned property of the Municipality over seven miles from the Stanislaus National Forest and over twenty-three miles from the Yosemite National Park. The Moccasin Power House is ninety-six miles from the Company's substation at Newark. The Company's operations under the agreement do not involve any use whatever by it of public lands.

This would seem clearly to show that there is no pertinency in the statement in the Petition (p. 14, lines 4-8) that "Whether local and private interests may thus frustrate a plainly expressed Congressional purpose to protect the use of national parks against private exploitation is, intrinsically, an issue of great general importance".

The portion of the Hetch Hetchy development which occupies either easements over or public lands is shown by Defendant's Exhibit A. It also shows the properties utilized in the same project which are held by the Municipality in private ownership; and again it shows the land within the Yosemite National Park which had been owned by the Municipality and which the Municipality, by the terms of the Raker Act, was required to convey to the United States.

From this exhibit it may be seen, among other things, that the Moccasin Power Plant and the transmission lines from the latter to the Newark substation of the Company are upon lands held by the Municipality in private ownership.

The Answer of the defendant shows precisely what lands and interests in lands were obtained by the Municipality from the United States (see Paragraph III of Answer, R. 42-45).

(11) Conclusion.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

San Francisco, January 4, 1940.

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